No. 10,531

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

INVESTMENT AND SECURITIES COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Upon Appeal from the District Court of the United States for the Eastern District of Washington

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INLAND-AMERICAN PTG. CO.

INDEX

TABLE OF CASES

TEXT BOOKS

STATUTES

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JURISDICTION

This action was brought in the nature of an interpleader by Charles P. Robbins, Shareholders' Agent for the shareholders of the Exchange National Bank of Spokane, hereinafter called cross-defendant and interpleader. Cross-defendant and interpleader paid into court $6,500.00, being the amount payable on account of liquidating dividends due a shareholder, Judson G. Rosebush, and prayed that the Investment and Securities Co. and the United States Attorney and his deputies at Milwaukee, Wisconson, be enjoined from suing said Charles P. Robbins (Tr. 2, complaint for intervention).

Investment and Securities Co., appellant here and complainant in intervention and petitioner for declaratory relief, is a corporation under the laws of Washington (Tr. 2, complaint in intervention and petition for declaratory relief), hence a citizen and resident of Washington. Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, defendant below, is a resident of the State of Wisconsin. Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife, supplemental defendants below, against whom default judgments were entered, are residents of Wisconsin. The United States of America is the additional intervenor which appeared asserting the right of the government to the money on the basis of a claim of tax liens and also on the basis of a certain writ of fieri facias issued in December 1941.

The matter in controversy, exclusive of interest

and costs, exceeds in value the sum of $3,000.00 (complaint in intervention admitted by the pleadings and stipulation in pre-trial order of January 19, 1943, Tr. 3, 99) and involves the construction of certain federal statutes including Revised Statutes Sec. 3186 as amended by Sec. 613, Revenue Act of 1928, 26 U. S. C. A. Internal Rev. Acts, page 461, et seq. and 26 U. S. C. A. Internal Revenue Code, Sec. 276 (c), and an actual controversy exists as to the title to said property within the meaning of the Federal Declaratory Judgment Act, United States Judicial Code, Sec. 274 (d) (U. S. C. A. Title 28, Sec. 400).

Jurisdiction of the District Court existed under Section 41, Title 28 U. S. C. A., Judicial Code, Sec. 24 amended. The appeal to this court is from the final judgment denying relief to complainant and petitioner Investment and Securities Co. and awarding funds involved to the United States, less the sum of $200.00 reasonable attorney's fees for Robbins, entered in the District Court on April 30, 1943. Notice of appeal was filed in the office of the Clerk of the District Court on July 13, 1943, and jurisdiction by this court is believed to exist under Sec. 225 (a) First, and (d), Title 28 U. S. C. A., Judicial Code, Sec. 128 amended.

STATEMENT OF THE CASE

Judson G. Rosebush, a citizen of Wisconsin, on July 27, 1937, owed Investment and Securities Co., of Spokane, Washington, (a Washington corporation), $76,749.00 (Defendant's Exhibit 1, Tr. 132, 114, Rosebush deposition 18). This indebtedness was on his two certain promissory notes as follows: A note dated November 30, 1932, in the principal amount of $25,000.00 with interest thereon at 6% from date and another note dated December 19, 1932, in the principal amount of $75,000.00 with interest thereon at 6% from date. The Investment and Securities Co. is a collection and liquidating organization for the benefit of the depositors of The Old National Bank of Spokane, a national banking association of Spokane, Washington, and as such acquired these Rosebush promissory notes of 1932. (Tr. 132, St. 7, Rosebush deposition 2). On April 22, 1936, the Investment and Securities Co. had sold all of the collateral securing this indebtedness, including some 820 shares of the Inland Empire Paper Company stock. A year later the liquidator Investment and Securities Co. had discovered the fact that Rosebush had paid assessments on certain shares of the Exchange National Bank, an insolvent national banking association, and had likewise ascertained that the Exchange National Bank might pay its creditors in full and possibly have something to pay over to former stockholders who had paid their assessments, such as Rosebush. (Tr. 114, St. 7 and 8). On April 20, 1937, Rosebush had submitted an offer of $820.00 in cash for the 820

shares of stock of the Inland Empire Paper Company (Plaintiff's Ex. A), and at the same time the Investment and Securities Co. attempted to get an assignment of his claim against the Exchange National Bank and threatened legal action as to the balance of his indebtedness if they did not receive it. Finally, Rosebush assigned to the Investment and Securities Co. on July 27, 1937, any recovery which might be made on the assessment which he had paid on his stock of the Exchange National Bank and received in return certain opportunities to reacquire the 820 shares of Inland Empire Paper Company common stock and a surcease from the legal action which had been threatened on April 28, 1937. (Defendant's Ex. 1, Plaintiff's Ex. A).

This action was originally commenced by Charles P. Robbins, Shareholders' Agent for the shareholders of the Exchange National Bank of Spokane, Washington, in the nature of an interpleader.

The Shareholders' Agent paid into court $4,250.00 and prayed that the Investment and Securities Co., hereinafter called intervening plaintiff, and the United States Attorney and his deputies at Milwaukee, Wisconsin, be enjoined from suing the Shareholders' Agent (complaint in intervention, Tr. 4). However, the Shareholders' Agent claims no part of this fund and should have no interest in this appeal as all parties stipulated that the attorney fees awarded out of the fund might be fixed by the Court without submission of testimony. (Tr. 129).

Rosebush had paid assessments in 1929 on his shares in the Exchange National Bank, a National

Banking Association, which had become insolvent. A deficiency had been assessed by the United States against Rosebush for income taxes due for the calendar year 1928. This assessment had appeared on the Commissioner's assessment list of February, 1934, which was received by the Collector of Internal Revenue at Milwaukee, Wisconsin, on February 18, 1934. On February 27, 1934, written notice and demand for payment had been served upon Rosebush, (Defendant's Exhibits 16 E and F), and a second notice was served March 23, 1934, (Defendant's Exhibits 16 F). On April 14, 1934, a warrant for distraint to the Deputy Collector for the District of Wisconsin was issued (Defendant's Exhibit 16 G). Notices of tax lien were filed in 1934 by the Collector in the District of Wisconsin, Milwaukee, Wisconsin, in Outagamie County, Appleton, Wisconsin (defendant's exhibit 16-I) and in Iron County, Michigan, (Plaintiff's exhibit D, defendant's exhibit 16-I), (St. 23, Tr. 129). However, it is admitted that no notice of tax lien was ever filed in Washington either with the Clerk of the Federal District Court for the Eastern District of Washington, or the County Auditor of Spokane County, Washington, (Tr. 17, 99, pleadings and pre-trial order January 19, 1943). It is likewise undisputed that there was never any attempt to enforce the statutory lien arising out of Revised Statute, Sec. 3186, as amended by 613, Revenue Act of 1928, 26 U. S. C. A. Internal Revenue Acts, page 461, by either the defendant Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, or the United States of America, additional intervenor, on any property

of the taxpayer in Washington until November 27, 1941 when an alleged writ of fieri facias was issued by the Clerk of the United States District Court for the Eastern District of Wisconsin under date of November 27, 1941, commanding the United States Marshal for the Eastern District of Washington, Northern Division, to levy upon certain "goods and chattels, lands and tenements" in his district of the said Judson G. Rosebush on account of a judgment entered November 26, 1941, in the Eastern District of Wisconsin for $37,220.85, plus costs. (Answer of United States, Exhibit A). This writ was served December 1, 1941, on the Shareholders' Agent of the Exchange National Bank, who commenced this action the following day. The writ was never served upon the Investment and Securities Co.

At the time the Exchange National Bank of Spokane failed on January 19, 1929, Judson G. Rosebush was the owner of 250 shares of the capital stock of that bank and by reason thereof paid to the receiver of that bank assessments on his stock totaling $25,000.00, which payments were made as follows:

Oct. 5, 1929	$5,000.00
Dec. 12, 1929	5,000.00
Feb. 3, 1930	5,000.00
June 2, 1930	10,000.00
Mar. 25, 1931, interest on deferred payments	1,590.20

Subsequent to these payments and subsequent to the execution of the contract of July 27, 1937, Charles P. Robbins, as Shareholders' Agent of said bank, paid certain liquidating dividends to other share-

holders who paid their superadded liability, but withheld the liquidating dividends due on account of assessments paid by Judson G. Rosebush. The date and percentages of the payments made by the Shareholders' Agent up to the time this action was brought were as follows:

July 5, 1940 ..... 7%
Dec. 20, 1940 ..... 4%
Dec. 10, 1941 ..... 6%
(Tr. 14, 21, 32, admitted by pleadings).

Meanwhile on July 27, 1937, as previously stated, Rosebush had assigned to the Investment and Securities Co. for a then good and valuable consideration, any recovery which might be made by him or on his behalf on account of these assessments paid by him on account of the Exchange National Bank stock; this assignment was contained in a written agreement, pertinent part of which reads as follows:

> "The party of the second part further agrees to and does hereby assign to party of the first part as security to the balance of indebtedness owing by the party of the second part to the party of the first part any recovery which may be made by or on behalf of party of the second part from or on account of an assessment paid on stock of Exchange National Bank, Spokane, Washington, and further agrees to make, execute and deliver to party of the first part any further instruments or documents necessary needful and proper to make this assignment for collateral purposes effective and to enable party of the first part to recover any amounts which may or shall be due by reason of the payment of such assessments on said Exchange National Bank stock. It is understood that the Collector of Internal Revenue has filed an Order of Distraint

against party of the second part and that this assignment is subsequent and junior to any lien against said recovery that said Collector of Internal Revenue may have acquired by virtue of such Order of Distraint."

This assignment of July 27, 1937, was served upon the Shareholders' Agent on March 14, 1938. (Pretrial order Jan. 19, 1943). There was present consideration given. (Plaintiffs Ex. A & C). The Investment and Securities Co. never conceded that the Collector did acquire any lien as to the recovery on the assessment of the stock of Exchange National Bank of Spokane, Washington, by virtue of distraint proceedings in Wisconsin.

Rosebush at that time understood the position of the Investment and Securities Co.—that the Government's lien had not attached to the property in Washington represented by Rosebush's claim for recovery against the Shareholders' Agent of the Exchange National Bank and consequently was not considered by Investment and Securities Co. as actually existing as a prior claim (Tr. 157, St. 14, Plaintiff's Ex. C, Rosebush Deposition 11, 12, 20, Defendant's Ex. 4). Investment and Securities Co. never agreed nor admitted that the Government's claim was prior to its own (Tr. 122, St. 16), and always considered that it had a right as a creditor of Rosebush and as a liquidator for the depositors of The Old National Bank of Spokane to whatever assets of Rosebush it could obtain (Tr. 124, St. 16, 17), and acted on advice of counsel in this regard (Tr. 125, St. 18). On the other hand, Rosebush apparently never revealed to the Govern-

ment the position of the Investment and Securities Co. and never turned over to the Collector of Internal Revenue in Milwaukee Investment and Securities Co.'s letter of April 28, 1937 (Plaintiff's Ex. A) outlining the Investment and Securities Co.'s position or a copy of his own letter of May 8, 1937 (Plaintiff's Ex. C) acceding to that position, because he was hopeful of effecting a compromise between the Government and himself of his income tax indebtedness (Tr. 139, 152, 155, 156, Rosebush Deposition 12, 25, 28, 29). Indeed, as far back as April 6, 1937, Rosebush had told the Investment and Securities Co. that he was hoping to compromise the Government's claim (Tr. 162, Rosebush Deposition 36, Defendant's Ex. 3). There was no question but that Rosebush received value in return for his assignment of his claim against the Exchange National Bank Stock (Tr. 114, St. 7, 8, Plaintiff's Ex. A & C.)

By one of the terms of the contract of July 27, 1937, Rosebush was given certain opportunities to reacquire 820 shares of Inland Empire Paper Company common stock, and to make agreements respecting other paper companies' stock in consideration for assigning to the Investment and Securities Co. as security to the balance of his indebtedness all the recovery which might be made on the assessment of his stock of the Exchange National Bank of Spokane, Washington. (Defendant Ex. 1, Plaintiff Ex. A). The indebtedness of Rosebush at that time to Investment and Securities Co. was in excess of $76,000.00.

(Tr. 114, St. 7). In addition Rosebush then averted the threatened legal action. (Plaintiffs Ex. 9, Tr. 165).

At the time of the execution of the contract of July 27, 1937, the controlling statute, Revised Statutes, Sec. 3186 as amended by §613, Revenue Act of 1928, 26 U. S. C. A. Internal Revenue Acts, page 461, was as follows:

> "such lien shall not be valid as against any mortgagee, purchaser or judgment creditor until notice thereof has been filed by the Collector—"

This section remained in force until it was amended by Section 401 of the Revenue Act of 1934 by which amendment the word "pledgee" was inserted immediately following the word "mortgagee." The complete section as amended is found in 26 U. S. C. A. 3672 and this pertinent part was pleaded in the complaint of intervening plaintiff.

Finally, Rosebush never gave the United States Government or the Commissioner of Internal Revenue any waiver or agreement in writing that would toll the statute of limitations of six years within the meaning of Internal Revenue Code, Sec. 276 (c), Title 26, U. S. C. A. 276 (c) (Tr. 163, Rosebush Deposition 35). More than six years elapsed from the time of filing of the assessment list with the Collector of Internal Revenue at Milwaukee, Wisconsin, on February 18, 1934, (when the tax lien arose) until November 27, 1941, when the Collector attempted to levy in Washington on property assigned to appellant by Rosebush on July 27, 1937.

SPECIFICATION OF ERRORS

(1) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof

> "That the right of the intervening plaintiff, Investment and Securities Company, was junior to and inferior to the tax lien of the United States." (Conclusion of Law 1, Tr. 230)

since the United States had failed to enforce its statutory lien against the property in Washington through the Collector's failure to file in Washington notice of the lien pursuant to 26 U. S. C. A. Internal Revenue Code Sec. 3672 (a) and for the further reason that such lien in any event became unenforcible by reason of lapse of time pursuant to 26 U. S. C. A. Internal Revenue Code Sec. 3671.

(2) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof

> "The additional intervenor, United States of America, had a tax lien against the right to participate in the dividends of the Shareholders of The Exchange National Bank, which Judson G. Rosebush assigned to the intervening plaintiff, Investment and Securities Company." (Conclusion of Law II, Tr. 230)

because the object of the additional intervenor, United States, was not to enforce a common law remedy in the collection of an admitted indebtedness of a tax imposition on Judson G. Rosebush by the Collector of Internal Revenue of Wisconsin for 1928 income

tax, the validity of which imposition was not challenged by intervening plaintiff, but to enforce a statutory lien under Revised Statutes, Sec. 3186 as amended by Section 613 Revenue Act of 1928, 26 U. S. C. A. Internal Revenue Code, page 461, against property in Washington which was once the property of Rosebush, but which at the time of the action was in the possession of the court and in the ownership of intervening plaintiff; because neither the Collector of Internal Revenue for Wisconsin nor additional intervenor, United States of America, complied with the prerequisites of the law to enforce such statutory lien as against mortgagees or purchasers by filing notice of the lien in the State of Washington.

(3) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof conclusion of law No. III (Tr. 231)

> "The right to participate in the dividends of the Shareholders of the Exchange National Bank was a property right, although in February, 1934, it was unliquidated and the amount undetermined and belonged to Judson G. Rosebush, and the lien of the United States attached thereto in February, 1934."

because the right to participate in the dividends paid by the Shareholders' Agent of the Exchange National Bank was non-existent in February, 1934; because the claim of Judson G. Rosebush against said Shareholders' Agent which was assigned to Investment and Securities Co. was contingent upon the payment in whole or in part of said liquidating dividends to those

shareholders of said Exchange National Bank of Spokane who paid their superadded liability on said bank stock; that the first payment of such liquidating dividends was July 4, 1940, of 7%, and that prior to this time any property right was non-existent.

(4) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof conclusion of law No. IV (Tr. 231)

> "The Right to participate in the dividends of the Shareholders of The Exchange National Bank, was intangible personal property, and the lien of the United States attached thereto as a result of the United States filing its assessment list with the Collector of Internal Revenue, for the District of Wisconsin, and in filing a notice of the tax lien with the Clerk of Outagamie County, Wisconsin, where Judson G. Rosebush resided."

because the lien of the United States arose when the assessment list was filed with the Collector of Internal Revenue for Wisconsin, but would not attach to property in Washington until a notice of the tax lien was filed in Washington; because the filing of a notice of tax lien in Wisconsin where Rosebush resided only affected property located there and not property in Washington; because the liability of the taxpayer Rosebush is one thing, and the creation and enforcement of a statutory lien for such tax against the property and claims of third parties is another and very different thing.

(5) The District Court erred in rendering and entering the final judgment and in concluding and

holding in part in support thereof conclusion of law No. V. (Tr. 231)

> "That the United States shall be entitled to the sum of $6,284.00 . . . "

since the United States failed to enforce its lien, if any, before it became unenforcible by reason of lapse of time within the meaning of 26 U. S. C. A. Internal Revenue Code Sec. 3671 and 3672 and 26 U. S. C. A. Internal Revenue Code Sec. 276 (c).

(6) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof conclusion of law No. VI. (Tr. 231)

> "That future payments covered by the right to participate in the dividends of the Shareholders of The Exchange National Bank, and payable to Judson G. Rosebush, shall be paid to the additional intervenor, United States of America."

for the reasons hitherto set forth by appellant with respect to conclusions of law I to V inclusive.

ARGUMENT

I.

Period of Lien

The assessment list relative to Rosebush's 1928 income taxes was received by the Collector of Internal Revenue at Milwaukee, Wisconsin, February 18, 1934 (Tr. 98, Pretrial Order, p. 2, Defendant's Ex. 16). The lien of the tax arose with the filing of the assessment list (§3186 Rev. Stat. as Amended by Act of May 29, 1928, Chap. 852; §613, 45 Stat. 875).

Under this section the Government's lien arose on February 18, 1934, but would only become valid as against the taxpayer Rosebush's mortgagees, purchasers, and judgment creditors on the date when notice of tax lien was filed in the proper state office where the taxpayer's property was located. Under the express provisions of the controlling statute (Rev. Stat. §3186 as Amended by §613 Revenue Act of 1928; 26 U. S. C. A. [Internal Revenue Acts,] page 461), which is as follows:

> "(a) . . . Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the Collector and shall continue until the liability for such amount is satisfied or becomes unenforcible by reason of lapse of time.
>
> "(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the Collector . . . "

notice of the lien was required to be filed where the property subject to the lien was situated, that is, in Spokane, Washington. No lien was filed by the United States Government or the Collector of Internal Revenue either with the County Auditor of Spokane County or in the office of the Clerk of the United States District Court for the Eastern District of Washington. Notice of lien was filed in Wisconsin in the district wherein Rosebush had his domicile (defendant's Ex. 16) prior to the assignment of Rosebush to appellant as found by the court (Finding of Fact I), but this was not enough under the statute.

A tax has only such lien or priority as is given it by statute. (*In re Wiley Co.,* 292 Fed. 900). The Federal income tax lien granted by the quoted statute is a general lien and is not necessarily preferred over other liens. (*Exchange National Bank of Tulsa v. Davy,* Internal Revenue Act of 1928, §13 (a); 26 U. S. C. A. §1560-1562, 13 F. Supp. 226). This Federal income tax lien can arise but once. It had only one effective date of beginning, and that was February 18, 1934. To say that this lien arises at one time as against Rosebush and at another time as against third parties such as the Investment and Securities Co. would ignore the essential nature of liens. (*United States v. Security National Bank,* 30 F. Supp. 113 at 116).

Certainly, there can be but one time that the lien could attach to property in the State of Washington, and that is when the provisions of the statute have been followed with respect to property in Washington.

The Government itself in the case of the *United States v. Rosebush,* 45 F. Supp. 664, recognized this principle that it must follow the statute strictly and file and record the tax lien every place it believed there was property. For example, on April 20, 1934, notice of tax lien was filed and recorded with the Auditor of Outagamie County, Appleton, Wisconsin. On December 17, 1934, similar notice of tax lien was filed with the Register of Deeds in Iron County, Michigan. (Tr. 129, St. 23, Plaintiff's Ex. D).

II.

Assignment of Chose in Action Protected By Statute

The Investment and Securities Co., was a mortgagee, or at least a purchaser. Sec. 3186 of Rev. Stat. as amended by §613 of the Revenue Act of 1928, 26 U. S. C. A. Internal Revenue Acts, page 461, provided in part that

> "(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the Collector . . . "

Subsequent to the execution of the agreement dated July 27, 1937, and in 1939 this statute was amended by inserting the word "pledgee" immediately following the word "mortgagee." The complete section as amended is found in 26 U. S. C. A. 3672 and the pertinent part was pleaded in the complaint of intervening plaintiff, Investment and Securities Co. (Tr. 11, Comp. of Intervening Plaintiff).

Appellant has found only two Federal cases where this question was discussed in connection with the statute prior to its 1939 amendment which are helpful in determining whether the Investment and Securities Co. occupied the position of a mortgagee or a purchaser. The decision of *Exchange National Bank of Tulsa vs. Davy,* 13 Fed. Supp. 226) is squarely in point. One Davy executed an assignment assigning all of the assets of a trust estate as collateral security for indebtedness owing by him, which assignment was prior to the filing of the Government's tax lien. It was held that the holder of this assignment had an equitable lien, which would not have to be recorded to make it effective, the Court saying at page 228:

> "In the instant case, the equitable lien arose by the assignment of the trust, and the trust property consisted of a chose in action, not real property, when given. No recording was required of such an assignment. The assignment became effective upon the trustee when notice of it was given; the beneficiary could not have effectively assigned the trust property to another after the first assignment, because the trustee, the legal title holder of the trust property, would have been bound to respect the first assignment. When the government filed notice of the tax lien, such lien attached to the trust property, subject to the rights of the assignee, the plaintiff herein."

This Court will keep in mind that in the case at bar no notice of the tax lien was ever filed in Washington. (Tr. 99, Pre-trial Order of Jan. 19, 1943).

In another case (*Equitable Life Assurance Society vs. Moore,* 29 Fed. Supp. 179) decided prior to the

1939 amendment of the word "pledgee," the United States District Court for the Eastern District of Illinois held that the assignee of certain shares of stock held as collateral security for the payment of a loan came within the type of creditor which the statute, 26 U. S. C. A. 3672, was intended to protect.

Prior to the 1939 amendment, under the decisions of the Supreme Court of the State of Washington an assignment of a chose in action for collateral purposes was a proper means of securing an indebtedness and was given the same force and effect as a chattel mortgage as concerns the rights of third parties. The words "mortgagee" and "purchaser" as they appear in the Federal statute under consideration are not defined. Judge Schwellenbach, sitting in the District Court for the Eastern District of Wisconsin, also rendered the decision in the case of the *United States vs. Rosebush,* 45 Fed. Supp. 664, and at page 667 stated: "Since the word purchaser is not defined by the statute, this Court must turn to the State law in determining its meaning."

In *Bellingham Bay Boom Co. vs. Brisbois,* 14 Wash. 173; 46 Pac. 238, the Washington Supreme Court held that an assignment of an account being sued upon for collateral purposes was superior to a subsequent garnishment, saying:

> "We think an assignment of a chose in action in good faith and for value, and with no intent to hinder, delay, or defraud creditors or subsequent purchasers, is complete and effectual as against third persons upon its execution and delivery to the assignee, and does not require any

> additional force and validity by notice to the debtor."

In *Hermans vs. Blakely,* 97 Wash. 647, 167 Pac. 128, it was held that Rem. Code §3659 providing that chattel mortgages may be made "upon all kinds of personal property" refers to tangible property that may be taken into possession, and not to intangible property, such as accounts and income and choses in action (overruling on rehearing, id. 93 Wash. 595, 161 Pac. 489). In that case the Washington Supreme Court pointed out that an assignment of future accounts receivable could be superior and prior to a subsequent garnishment.

Recognizing that intangible choses in action are often of great value and should be available to owners for security purposes, the Washington Supreme Court has consistently upheld the validity of such a chose in action for collateral purposes and has upheld the rights of the assignee as against third parties. No recording of such an assignment as in the case at bar is necessary to give it validity in our State courts. The Washington Supreme Court said in *Hughes Inc. vs. Widders,* 187 Wash. 452, 60 P. (2d) 243, at page 455:

> "If the assignment was of a chose in action, it was not necessary that it be executed and filed as a chattel mortgage, because the statute covering the manner of the execution and filing of chattel mortgage refers to tangible property which may be taken into possession."

The same Court had previously held in *Cox v. Bateman,* 139 Wash. 135, 245 Pac. 915, that an assignment

of all of the proceeds that the assignor might receive in a lawsuit, which assignment had been given for collateral purposes, had priority over a subsequent garnishment. However, the United States District Court in the case at bar considered that the written assignment of July 27, 1937, from Rosebush to appellant could not be regarded as a mortgage, for the reason that there was no affidavit of good faith or compliance with the chattel mortgage statute, and narrowed the primary question in the case down to whether on July 27, 1937, (the date of the assignment to appellant) the Government had a lien against the right which Rosebush assigned (Tr. Trial Court's Opinion.

In holding that the appellant could not recover, the United States District Court decided that the Investment and Securities Co. was a pledgee and hence not within the provision of 26 U. S. C. A. 3672, for the reason that the word "pledgee" was not inserted until the Act was amended on June 29, 1939. In so deciding, the United States District Court, we respectfully submit, did not consider the decisions of the State Supreme Court to the effect that an assignment of a chose in action for collateral purposes is a proper means of securing an indebtedness. Such assignee should be given the same protection as a mortgagee or purchaser under the Federal statute.

Furthermore, the United States District Court apparently did not consider as significant the fact that the assignee, Investment and Securities Co., gave valuable consideration for the assignment of the

chose in action. Rosebush, the assignor, received in return certain opportunities to reacquire the 180 shares of Inland Empire Paper Company common stock which had been foreclosed a year before, as well as other concessions regarding other paper companies stock, and a surcease from the legal action with which he had been threatened by Investment and Securities Co. on April 28, 1937 (defendant's exhibit 1, plaintiff's exhibit A).

It was most appropriately said by Judge Schwellenbach in *United States vs. Rosebush,* 45 Fed. Supp. 664, "The term purchaser embraces every person to whom any interest or estate shall be conveyed for a valuable consideration. *Butler vs. Bank of Mazeppa,* 94 Wisc. 351; 68 N. W. 998. A valuable consideration may consist of either some right, interest, profit, or benefit accruing to one party or some forebearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. *Onsrud vs. Paulsen,* 219 Wisc. 1; 261 N. W. 541."

This granting of repurchase privileges for stock and forbearance to sue was valuable and sufficient consideration for the assignment of the chose in action to appellant by Rosebush. Restatement of Law, Contracts Sect. 76, 77 and 81 infra.

III.

Federal Income Tax Lien Has No Inherent Special Priority

The Federal tax lien is a general one and not necessarily preferred over other liens. (*In re Wiley Co.,* 292 Fed. 900; *Exchange National Bank of Tulsa v. Davy,* 13 F. Supp. 226).

Section 3186 of the Revised Statutes as amended by Section 613 of the Revenue Act of 1929 does not provide for any special priority as between such liens and other liens such as the lien of appellant. Congress in specifically providing for income tax assessment and collection formulated and established a complete code of procedure, but it is well settled that in order to support and enforce a statutory lien for taxes all the requisites of the statute granting the lien must be strictly followed with respect to the claim of a creditor intended to be covered by the statute; the lien is not created by the statute itself without any action on the part of the collector. Every requirement of 26 U. S. C. A. 3672 as to filing notice of lien must be met by the collector. The Federal Statute makes provision for distraint by the collector outside his district. 26 U. S. C. A. Sec. 3713. The question in this case is not the liability of the delinquent taxpayer. The appellant alleged "that your complainant and petitioner does not challenge the validity of any tax imposition on said Judson G. Rosebush by said defendant Collector of Internal Revenue for Wisconsin." (Tr. 13 Complaint in Intervention, §VII).

The language of *United States v. The Pacific Railroad et al.* 1 Fed. 97 at 102, is singularly apropos in describing the efforts of the Government to subject the fund in Washington to the lien which arose in Wisconsin:

> "Here the object is not to enforce a common law remedy in the collection of an admitted indebtedness, but to enforce a statutory lien against property which was once the property of the debtor but is now in the possession and ownership of others. It is well settled that, in order to support and enforce a statutory lien for taxes, all the prerequisites of the laws granting the lien must be strictly complied with * * * The lien is not created by the law itself without any action by officers under the law, though a debt be thus created. The liability of the taxpayer is one thing; the creation and enforcement of a lien, especially against innocent parties, is another and very different thing."

The Federal statute does not define "purchasers." Appellant had actual notice of a claim of the United States at the time the July 27, 1937, assignment was made, but gave value for the assignment. Appellant had been informed by Rosebush that he was hoping to settle his tax liability with the Government. Rosebush testified as follows on his deposition:

> "(Re-Direct Examination by Mr. Kelley)
>
> "Q. Did you ever tell the Investment and Securities Co. that satisfactory arrangements would be made by you to pay the United States Government?
>
> "A. I told them I was hoping to make a contemplated settlement with the Internal Revenue Department.

"Q. When did you tell them that?

"A. I think that was along in 1937--1936." (Tr. 162).

Rosebush wrote appellant a letter on April 6, 1937, in which he expressed the opinion that he was not free to assign his equity in the Exchange National Bank stock but also stated concerning his tax liability "On the other hand, I am hoping presently to get that out of the way, but until I do I wonder if it would not be premature to make any agreement regarding that item." (Defendant's Ex. 3).

The answers of the Government and Collector set up five affirmative defenses, including the allegations that the agreement of July 27, 1937, was procured by wrongful acts, conduct and representations to Rosebush. There was not a shred of evidence adduced in support of such allegations and this defense sounding in tort was apparently abandoned at the time of trial as no evidence was offered. However, irrespective of this, actual knowledge of the Government's claim will not defeat a prior lien where the Government does not file notice of its lien. It has been held that where a chattel mortgage on growing wheat to secure a note given for a pre-existing debt was filed the day before notice of the Federal Government's tax lien was filed, the mortgage lien had priority over the tax lien, *notwithstanding mortgagor and mortgagee knew that the tax had been assessed and intended that* the mortgage lien have preference. (Italics ours). *Schmitz v. Stockman,* 101 P. (2d) 962. Again it has been held that a mortgage lien was entitled to priority

over the Government's tax lien upon mining properties where the tax lien notice was not filed pursuant to state law until long after the mortgage had been executed and recorded, and the only notice of tax lien filed in the district court was filed in the wrong district, *notwithstanding that the mortgagee knew at the time of execution of the mortgage that mortgagor owed taxes.* (Italics ours). *United States v. Beaver Run Coal Co.* 99 F. (2d) 610.

On July 27, 1937, appellant on advice of counsel (Tr. 125, St. 18) did not concede that the Collector of Internal Revenue for Wisconsin had acquired a lien on the chose in action in Washington for recovery on account of assessment on the bank stock of the Exchange National Bank of Spokane, Washington, because (1) there was then no property in existence; (2) there was no notice filed under the Washington state law; (3) even if the collector's lien were senior by virtue of filing notice of it in Wisconsin, the collector still had to enforce it within six years of February 18, 1934, and he might fail to do so, since three years of that time had already run; (4) Investment and Securities had no knowledge of any waiver signed by Rosebush extending the period of limitation upon assessment and collection and in fact there was none (Tr. 125, 126, 163, St. 18, 19 and 35).

The Federal statutes provided, first, for a summary method for enforcement of tax lien on both personal and real property by distraint and sale, and made provisions for distraint by a collector outside his district (26 U. S. C. A. Sec. 3713, 3678). The

position of appellant is not, we submit, unjust toward the Government. As it was said in *United States v. Pacific Railroad,* 1 Fed. 97 at 100:

> "Nor is it unjust toward the government, for it is fair to presume that the Government, armed as it is with so many agencies and appliances for ascertaining what taxes are due and unpaid, and from whom, and all-powerful as it is to enforce its rights, will, within reasonable time, make demand, or take some steps in the direction of making collections, in all cases where there is delinquency."

Sixty-three years later, the same principle was recognized in *United States v. Morris & Essex R. Co.,* 135 F. (2d) 711, when L. Hand, Circuit Judge, held that a "tax claim" is not like an ordinary claim and plaintiff need not wait for judgment in order to levy execution since it can distrain after notice and demand. An assessment was held the equivalent of a judgment for purposes of collection within the meaning of 26 U. S. C. A. Internal Revenue Code, Secs. 3690, 3710.

IV.

Federal Income Tax Lien Never Established in Washington

The lien created by the provisions of Revised Statues Sec. 3186 (a), as amended by Act of May 29, 1928, 26 U. S. C. A. Sec. 367, is a purely statutory creation and is in effect a judgment in favor of the United States against the tax debtor. Since the lien is a statutory lien, its character, operation and extent must be ascertained from the terms of the statute.

The 1928 amendment made a most significant change in language. It provided that the lien should "continue until the liability for such amount is satisfied, or *becomes unenforcible by reason of lapse of time.*" (Italics ours). It was said in the case of *United States v. Beaver Run Coal Company,* 99 F. (2d) 610 at page 612 in referring to certain statutes:

> "Whether a statute creating a lien is to be given a liberal or a strict construction, it is well established that 'the character, operation and extent of the lien must be ascertained from the terms of the statute which creates and defines it, and the lien will extend only to persons or conditions provided for by statute, and then only where there has been at least a substantial compliance with all the statutory requirements.' 37 C. J. 309, 322, 323; In re Brunquest, 4 Fed. Cas. p. 482, No. 2,055; The Suelco, D. C., 286 F. 286; *Gile v. Atkins,* 93 Me. 223, 44 A. 896, 74 Am. St. Rep. 341. Positive legislative enactments prescribing conditions essential to the existence and preservation of a statutory lien cannot be disregarded. *Augustine v. Congregation of Holy Rosary of Pompeii,* 231 Wis. 517, 252 N. W. 271."

The general rule as to the construction of statutory liens is found in 33 Am. Jur., 432 (liens), Sections 25 and 26. The language therein contained is as follows:

> "25. Validity.—Liens created by statute are ordinarily governed by and find their efficacy within the provisions of their foundation, and their validity is entirely dependent on the terms of the statute. It is within the power of the legislature to provide for liens to secure the payment of debts and other obligations, subject to constitutional limitations . . .
>
> "26. Construction and Application of Statutes. — . . . It may here be stated generally that where

> a lien is provided for by a statute which is merely declaratory of the common law, it must be interpreted in conformity with its principles. On the other hand, where the legislature has enlarged and defined a common-law lien, its definition supersedes the definition of the courts, and thereafter, the exercise of the powers of the courts with respect to such liens must be consistent with the legislative definition. *A lien created by statute is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute;* it cannot be extended by the courts to cases not provided for by the statute, nor can it be substituted by a bond . . . " (Italics ours).

It was held in the case of *Bull v. United States,* 55 S. Ct. 695, 295 U. S. 247, that the assessment made by the Collector is given the force of a judgment, the Court saying:

> " . . . The assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign."

The Government itself, in the case of the *United States vs. Rosebush,* 45 Fed. Supp. 664, recognized that it had to follow the statute and file and record its tax lien every place it believed there was property. For example, on April 20, 1934, notice of tax lien

was filed and reported with the Auditor of Outagamie County at Appleton, Wisconsin. On December 17, 1934, a similar notice of tax lien was filed with the Register of Deeds in Iron County, Michigan, (defendant's exhibit 16). The Federal statutes provided collection authority for the Collector of Internal Revenue of Wisconsin to have transferred his assessment to Washington or any other place outside his district where Rosebush might have real or personal property liable to be seized and sold for tax (26 U. S. C. A. 3651). Such statutory steps were never taken in the case at bar.

1. The situs of the claim for recovery on account of the assessments paid on the Exchange National Bank stock of Spokane, Washington, was in Washington despite the fact that the actual stock certificates were in Wisconsin. The Exchange National Bank was in Washington.

2. All interested parties except Rosebush are in Washington.

3. A practical interpretation of the Federal statute should impel the Court to hold the situs of the chose in action to be in Washington despite the fact that Rosebush was a citizen of Wisconsin. Any other interpretation would compel the Exchange National Bank or any other National Banking Association to check the records in the various states at the domicile of every stockholder before paying dividends, or at least the records in the various states of the domicile of every stockholder who had paid the superadded liability.

V.

Collection of the Tax Barred by the Statute of Limitations

Regardless of whether Investment and Securities Co. came within the protection of the Revenue Act of 1928 when the agreement of July 27, 1937, was executed, nevertheless the claim for tax lien on the recovery on the assessment of the Exchange National Bank stock owned by Rosebush, which was never made in Washington until a writ of fieri facias was issued in December, 1941, by the Federal District Court for the Eastern District of Wisconsin, to be served on the Shareholders' Agent of said Bank in Washington, was barred by the Statute of Limitations, as set forth in Internal Revenue Code, Section 276 (c), Title 26 U. S. C. A., Section 276 (c), which provides:

> "*Collection after assessment.* Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. 53 Stat. 87."

This Court will remember that Rosebush did not sign any agreement to the effect that the amounts assessed might be collected from him by distraint or

by a court proceeding commenced at any time, (Tr. 163) as did the taxpayer in the recent case of *Citizens National Trust and Savings Bank of Los Angeles vs. the United States,* 135 F. (2d) 527. There the appellant could raise no question as to the effect of the waiver of the statute of limitations which it was acknowledged the taxpayer had signed. In that case this Court indicated that a correct interpretation of Revised Statutes Section 3186 as amended by Section 613, Revenue Act of 1928, lies in the comparison of a Federal tax lien and a judgment lien. This Court has stated:

> "An analogy between the two may be drawn in accordance with the theory of *Bull vs. the United States,* 295 U. S. C. A. 247; 55 Supreme Court 695; 79 L. Ed. 1421, that a Federal tax has the effect of a judgment."

The Federal tax in the case at bar arose February 18, 1934. Under the specific provisions of the Internal Revenue Code, §276 (c), Title 26 U. S. C. A., §276 (c), the period of limitations for collection of that tax lien expired February 18, 1940. If Rosebush had signed a waiver or executed any writing that would extend the period of limitation beyond February 18, 1934, the appeal on this point would not have been taken. But the trial court did not pass upon the question of the Statute of Limitations at all, although the Statute was affirmatively pleaded (Tr. 105, amended reply) and Rosebush had testified as follows:

> "Q. Now did you as a taxpayer ever give the United States Government a waiver in connection with an offer to compromise this claim of

theirs you have testified to for income for the year 1928?

"A. Not that I can recall.

"Q.You never gave them a waiver.

"A. Not so far as I can recall."

(Tr. 163 Rosebush deposition 35).

And neither the Government nor the Collector of Internal Revenue for Wisconsin adduced any testimony to show that the period of limitation had been extended by a subsequent agreement in writing made before the expiration of the period.

On the other hand, the record shows that a prima facie case at least was made to the effect that title to the chose in action was vested in appellant, a non-taxpayer, on July 27, 1937, and that there was never any effective establishment of any Federal tax lien at any time and the purported levy on an intangible chose in action was made subsequent to February 18, 1940.

Certainly under such circumstances a court of equity may enjoin the attempted seizure of property by a writ of fieri facias issued seven years after the tax lien arose, particularly since the Federal statutes provide for a summary method for the enforcement of tax liens on both personal and real property by distraint and sale and make provision for distraint by a collector outside of his district. (26 U. S. C. A. 3713, 3678, *Filipowicz v. Rothensies,* 31 F. Supp. 716).

With reference to the period of six years after assessment of the tax as being the Statute of Limitation

provided for in Internal Revenue Code 276 (c), Title 26 U. S. C. A., §276 (c), it has been held that the "sole purpose of this enactment was to fix a time beyond which 'steps to enforce collection' might not be initiated." *United States vs. Havner,* 101 F. (2d) 161, 165. Such a provision, when contained in a tax statute, is to be construed liberally in favor of the taxpayer. *United States vs. Updike,* 281 U. S. 489, 496; 50 S. Ct. 367; *Bowers vs. New York and Albany Lighterage Co.,* 273 U. S. 346, 349; 47 S. Ct. 389. In the latter case it was held that a law barring "suits" and "proceedings" for a collection of income and excess profits tax after five years barred collection by distraint proceedings under Revenue Act of 1921, Sec. 250 (d). The part of the Act that has a bearing follows:

> "No suit . . . or proceeding for the collection of any such taxes . . . shall be begun after the expiration of five years after the date when such return is filed."

The petition there insisted that the word "proceeding" referred only to a proceeding in court and meant the same as "suit" and that the act prescribed no limits against the collection of such taxes by distraint. It apparently was conceded that the collection of taxes by a judicial proceeding would come within the meaning of the statute. The Supreme Court, in discussing the methods of compelling payment of taxes and the purpose of the Statute of Limitations, said:

> "There are two methods to compel payment. One is suit, a judicial proceeding; the other is distraint, an executive proceeding. The word

> "proceeding" is aptly and commonly used to comprehend steps taken in pursuit of either. There is nothing in the language or context that indicates an intention to restrict its meaning, or to use "suit" and "proceeding" synonymously.
>
> "The purpose of the enactment was to fix a time beyond which steps to enforce collection might not be initiated. The repose intended would not be attained if suits only were barred, leaving the collector free at any time to proceed by distraint. In fact distraint is much more frequently resorted to than is suit for the collection of taxes. The mischiefs to be remedied by setting a time limit against distraint are the same as those eliminated by bar against suit. Under petitioner's construction taxpayers having no property within reach of the collector would be protected against stale demands, while others would be liable to have their property distrained and sold to pay like claims. The result tends strongly to discredit petitioner's contention."

In the Updike case a six-year limitation on a court proceeding to collect a tax was held applicable to a suit to recover corporation taxes brought against stockholders as transferrees of a defunct corporation's assets under Revenue Act 1926 Sec. 278 (a) (d), 280. The principal difference there was whether a suit having been brought more than six years after the assessment was barred by the following provision of Sec. 278:

> "(d) Where the assessment . . . has been made (whether before or after the enactment of this act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by proceeding in court (begun before or after the enactment of this act), but only if begun (1) within six years after the

assessment of the tax . . . " 26 U. S. C. A. 1058, 1069.

A comparison of the language shows that it corresponds to the present 26 U. S. C. A. 276 (c) that was affirmatively pleaded by the intervenor in the case at bar (amended reply). It would seem that, if the period of limitation has run in favor of Rosebush, as to property in Washington, it has run in favor of his transferrees. In the Updike case the Court said on page 369:

> "It follows that, if by section 278 (d) the period of limitation had run in favor of the corporation, it had run in favor of the transferrees. The contention of the government that the section does not apply under the facts of the present case depends upon the meaning of the phrase which we have italicized: 'Where the assessment . . . has been made . . . *within the statutory period of limitation properly applicable thereto,* such tax may be collected . . . by a proceeding in court . . . but only if begun (1) within six years after the assessment of the tax . . . ' The argument in effect, is this: in 1920 when the assessment was made, there was, and had been, no provision of law which in any form limited the time for assessing or collecting taxes, and therefore an assessment in 1920 of 1917 taxes could not fulfill the requirements of section 278 (d), because, in that view, there was no 'statutory period of limitation properly applicable thereto;' and, assuming the applicability of statutes passed after 1920, the provision in these statutes is that the assessment may be made 'at any time,' and that is not a *period* of limitation within the meaning of Section 278 (d), for the word 'period' connotes a stated interval of time commonly thought of in terms of years, months, and days."

The clear intent of Section 276 (c) as applied to the facts of the present case was to designate the extent of time for the *enforcement* of the tax liability. The Wisconsin action was a proceeding begun within six years after assessment, but no such proceeding to enforce collection was brought in Washington within six years. The statutes to collect the tax provide for a proceeding either by distraint or by court action. Here neither method was pursued in Washington within the six-year bar.

This Court will bear in mind that the amount and validity of the assessment of February 18, 1934, are not challenged, but appellant contends that Rosebush, never having signed a waiver within the meaning of Internal Revenue Code, Section 276 (c), Title 26 U. S. C. A., Section 276 (c), (Tr. 163) could make a valid assignment of a chose in action on July 27, 1937, in Washington that would have precedence over a tax lien concerning which there were no steps to enforce in Washington within six years of its inception. (Tr. 99).

CONCLUSION

It is the contention of appellant, Investment and Securities Co., that the lien given the United States under the statutory provisions hereinabove set forth is purely a statutory one and is limited strictly to the right given by the language of the statute; that said lien arose with the filing of the assessment list with the Collector of Internal Revenue in Milwaukee, Wisconsin, on February 18, 1934; that said lien never was established in Washington although the lien became in effect a judgment in favor of the United States which gave the United States the right to pursue property by a distraint or by a court proceeding under the pertinent statutory provisions hereinabove set forth at any time within six years from February 18, 1934. In the instant case no lien was ever established in Washington where the property was located. Therefore it should be determined that the right, title and interest of the appellant, Investment and Securities Co., is prior and superior to the unenforcible lien of the Federal Government and that the decree in the instant case should so provide.

Respectfully submitted,

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